FILE COPY

No. 795

In the Supreme Court of the United States

October Term, 1937

UNITED STATES OF AMERICA, PETITIONER,

v.

TWO MARITIME-SCHOONER "KOTA MIN-DORO," LENGTH 52 FEET, BEAM 21.5 FEET, DRAFT 8.3 FEET, OFFICIAL NO. [illegible],

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

TWO-MASTED AUXILIARY SCHOONER "RUTH MILDRED," length 82 feet, beam 21.5 feet, depth 8.1 feet, official No. 222218

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Second Circuit entered on March 9, 1932, affirming the decree of the District Court for the Southern District of New York dismissing a libel of information filed against the schooner *Ruth Mildred,* wherein the forfeiture of the vessel was sought under Section 4377 of the Revised Statutes (U. S. C., Title 46, Sec. 325).

OPINIONS BELOW

The opinion of the District Court (R. 50) is reported in 47 F. (2d) 336. That of the Circuit Court of Appeals has not yet been reported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether a licensed vessel of the United States seized by customs officers while illegally transporting a cargo of intoxicating liquor within United States territorial waters may be proceeded against by the Government only as provided in Section 26, Title II, of the National Prohibition Act, or whether in lieu of so proceeding the United States may libel the vessel for forfeiture under Section 4377 of the Revised Statutes for engaging in an unlicensed trade.

STATUTES INVOLVED

Section 4377 of the Revised Statutes and Section 26, Title II, of the National Prohibition Act, are printed in the Appendix, *infra*, pp. 7–9.

STATEMENT

The *Ruth Mildred* is an American two-masted auxiliary schooner which was licensed for fishing. (R. 41, 42.) On March 1, 1928, she was ob-

served by the Coast Guard in Long Island Sound off New London, Connecticut, making headway in the direction of New York. (R. 11, 12, 43.) A Coast Guard patrol boat followed her all night and until about eleven o'clock the next morning, when she docked in the East River, New York. (R. 13, 43.) At that point all the crew, including the master, hurriedly disappeared. (R. 13.) Later, however, the master, who was also the vessel's owner, returned to the scene. (R. 13, 14, 43.)

The master admitted to the Customs officers who were present to search the vessel that his ship contained liquor, and it was later determined upon search that the *Ruth Mildred* was carrying 390 packages of such merchandise. (R. 21, 22, 44.) The vessel was seized (R. 44) and her master was arrested (R. 16). No information respecting the criminal prosecution is contained in the record except that the master was charged in a complaint with having conspired with others unknown to violate the National Prohibition Act and the Tariff Act. (R. 46.)

In due course a libel of information was filed against the *Ruth Mildred* in the Southern District of New York, claiming her forfeiture under R. S. 4377 for engaging in an unlicensed trade. (R. 3.) Nils Soderberg, the arrested master, intervened in the suit as owner-claimant. (R. 6.) In his answer (R. 8) he denied generally the offense which was charged and contended in addition that the Govern-

ment had mistaken its remedy. It was his contention that that Government's exclusive right of action lay in Section 26, Title II, of the National Prohibition Act.

After trial the District Court entered a decree dismissing the libel. (R. 49.) This disposition of the case was affirmed by the Circuit Court of Appeals. Both courts held that the facts established a violation of the transportation features of the National Prohibition Act. They concluded, therefore, that the Government's exclusive right of action against the vessel was found in that Act.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in decreeing that the libel be dismissed and in holding that a licensed vessel of the United States seized while engaged in the unlawful trade of transporting intoxicating liquor in violation of her license could be forfeited only as provided in Section 26, Title II, of the National Prohibition Act. (R. 71, 72.)

REASONS FOR GRANTING THE WRIT

This case presents one important phase of the problem which has confronted the Government since this Court, in *Richbourg Motor Co.* v. *United States*, 281 U. S. 528, discussed the question of conflict between Section 26, Title II, of the National Prohibition Act, and Section 3450 of the Revised Statutes. The general question is whether vessels

or vehicles which are apprehended in the illegal transportation of liquor within the United States must be proceeded against for forfeiture under the National Prohibition Act to the exclusion of applicable Customs and Navigation laws.

The diversity of views expressed upon this subject by the lower courts since the Richbourg decision is pointed out in detail in the appendix to a petition for writ of certiorari which is now before this Court in *United States of America, Petitioner,* v. *Commercial Credit Co.,* No. 734, October Term, 1931. Subsequent to the filing of that petition the Circuit Court of Appeals for the Second Circuit decided the instant case and a companion case, the *Sebastopol.* In the one the Government's libel was not sustained, while in the other it was. The *Sebastopol* was libeled for the collection of a penalty imposed under the Tariff Act of 1922.

It is understood that the claimant in the *Sebastopol* case intends to petition this Court for a review of that decision. If such a petition be filed the Government proposes to offer no opposition. The *Sebastopol* case presents another phase of the same general question. It would seem desirable that its question of statutory conflict should also be considered and decided by this Court.

Still another phase of the general question is now before this Court in *General Motors Acceptance Corporation* v. *United States,* No. 574, October Term, 1931, where conflict between Section 26, Title

II, of the National Prohibition Act, and Sections 3061–2 of the Revised Statutes is asserted. The relation of the instant case to case No. 574 is such that your petitioner suggests the desirability of having them considered together by this Court.

The decision of the Court of Appeals in the *Ruth Mildred* case is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Pilot*, 43 F. (2d) 491.

Wherefore, it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

MARCH, 1932.

APPENDIX

Section 26, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, Sec. 26, 41 Stat. 305, 315—U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally, shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction

of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 4377 of the Revised Statutes (U. S. C., Title 46, Sec. 325):

Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen

of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered license, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever.

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